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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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JOHN ROBINSON by His Guardian Ad Litem
MARY JANE YOUNG,

Petitioner,

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

---

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

## QUESTIONS PRESENTED FOR REVIEW

I. Whether the Secretary's failure in a 1971 proceeding to consider uncontradicted evidence in the record of paternity and dependency constitutes "error on the face of the evidence" and grounds for reopening the proceeding more than four years later.

II. Whether the government's position can be considered "substantially justified" within the meaning of the Equal Access to Justice Act when it is supported by "no evidence."

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The petitioner, John Robinson, by his guardian ad litem, Mary Jane Young, prays that a writ of certiorari issue to review the judgment entered by the United States District Court for the Middle District of North Carolina on April 16, 1985, which

judgment was affirmed by the United States Court of Appeals for the Fourth Circuit entered February 21, 1986.

## OPINIONS BELOW

The publicized opinion of the Fourth Circuit, rendered on February 21, 1986, is contained in the Appendix to this Petition. The unpublished opinions of the United States District Court for the Middle District of North Carolina dated January 26, 1983; February 23, 1983; August 15, 1984; September 27, 1984; and February 15, 1985, are contained in the Appendix to this Petition. The Decision of the Appeals Council, Department of Health and Human Services, Social Security Administration, is also contained in the Appendix to this Petition.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATING PROVISIONS INVOLVED

28 U.S.C. § 2412(d) (1) (A)

20 C.F.R. § 404.988:

A determination, revised determination, decision, or revised decision may be reopened--

(a) Within 12 month of the date of the notice of the initial determination, for any reason

(b) Within four years of the date of the notice of the initial determination if we find good cause, as defined in § 404.989, to reopen the case; or

(c) At any time if--

(1) It was obtained by fraud or similar fault;

(3) A person previously determined to be dead, and on whose earnings record your entitlement is based, is later found to be alive;

(8) It is wholly or partially unfavorable to a party, but only to correct clerical error or an error that appears on the face of the evidence that was considered when the determination or decision was made; or

* * *

## STATEMENT OF THE CASE

The petitioner seeks review of that portion of the judgment of the United States District Court for the Middle District of North Carolina which denied his claim for Social Security benefits as the child of a wage earner, John Howard Jones, Jr., from June 8, 1971, through April 30, 1980, and that portion of the judgment which denied his claim for costs and fees, including attorney's fees, under the provisions of the Equal Access to Justice Act in effect at all times pertinent to the case at bar.

On June 8, 1971, Mary Jane Robinson

applied for Social Security benefits on behalf of John H. Robinson as the child of wage earner John Howard Jones, Jr. In written statements accompanying the 1971 application, Mary Jane Robinson stated that she and the wage earner father "had lived together as if (they) had been married for at least six months prior to his (Jones) injury," that the father was "living with (her) for more than six months prior to being injured in January 1966." Other statements filed in support of the application stated that the wage earner, John Howard Jones, Jr., had admitted that he was spending his nights with Mary Jane Robinson and that they were going to have a baby. In another statement filed in support of this application, Mr. Jones' parents stated that their son had orally acknowledged to them his paternity of petitioner John H.

Robinson. This application for Social Security benefits was denied on August 31, 1971. This adverse determination made no findings concerning the uncontested evidence that while petitioner was wage earner John Howard Jones, Jr., lived with the petitioner and acknowledged his paternity of petitioner. That latter was based on a finding that there had been no legally sufficient written acknowledgement of paternity under North Carolina law and that the wage earner and the mother of petitioner had not been married.

On April 30, 1980, Mary Jane Robinson filed another application on behalf of John H. Robinson. The Social Security agency denied relief, but on application to the United States District Court for the Middle District of North Carolina for judicial review the matter was remanded on the

grounds the agency's determination was not supported by evidence. In this initial appeal to the District Court, the magistrate to whom the case had been assigned concluded that these proceedings constituted a discretionary re-opening of 1971 application and remanded the case to the agency for the proceedings. The agency determined that John H. Robinson did meet the requirements of a grant of benefits insofar as paternity and "living with" requirements were concerned and made an award of benefits in favor of John H. Robinson. The appeals counsel contended that the 1971 application had become administratively final, declined to award benefits for any period prior to 1980, and awarded benefits for the period from and after the effective date of the 1980 application.

Petitioner once more appealed to the United States District Court for the Middle District of North Carolina. The Court affirmed the agency's decision denying benefits for the period 1971 to 1980, granting benefits for the period from and after the effective date of the 1980 application on behalf of petitioner for attorney's fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2142 (d)(1)(A) then in effect. Upon appeal to the United States Court of Appeals for the Fourth Circuit, the Court affirmed the decision of the District Court, Judge Swygert, Senior Circuit Judge of the United States Court of Appeals for the Seventh Circuit, dissenting.

REASONS FOR GRANTING THE WRIT

1. Petitioner seeks recovery of costs and fees, including attorney's fees,

for services in a non-administrative setting with respect to his claim for benefits from 1980 forward. Under the Equal Access to Justice Act, a prevailing party may obtain attorney's fees when the government cannot show that its position was substantially justified or that special circumstances would make an award unjust 23 U.S.C. § 2421 (d)(1)(A). While the Equal Access to Justice Act did not define the term "substantially justified," legislative history and case law gave it its meaning. The Fourth Circuit held in Guthrie vs. Swygert, 713 F.2nd 104, 108 (4th Cir. 1983) that the government's position in the District Court normally would be substantially justified if, as is usual, the United States Attorney does no more than rely on an arguably defensible administrative record.

In McDonald vs. Schweiker, 726 F.2nd 311, 316 (7th Cir. 1983) it was held that to be substantially justified the government's position cannot be just "non-frivolous," that, instead, the government must be proceeding on the basis of a solid legal claim or defense.

The District Court below, in its review of the agency's initial denial of the post-1980 benefits application, found that the Secretary had no rational or justifiable reason for rejecting the uncontradicted affidavits of petition's witnesses and found that there was "no evidence" to support the Secretary's decision with respect to post-1980 benefits. As the dissent noted below, the issue of whether to grant post-1980 benefits was essentially a straightforward application of new and material evidence

and the initial government position was supported by "no evidence."

Petitioner's request for legal fees and expenses is based upon petitioner's prevailing over the Secretary on the 1980 claim and with respect to that petition, fees should have been awarded. The Secretary has argued that there was a factual basis in the record and a basis in the law for the respondent's decision to reject initially the awarded benefits beginning in 1980, forcing petitioner to appeal to the District Court in the first instance. Respondent apparently maintained that the factual basis in the record and the basis in law for the decision to reject the awarded benefits beginning in 1980 is grounded upon respondent's reported decision not to believe the contents of any

of the affidavits filed by petitioner in support of petitioner's post-1980 claim.

While it is clear that it is within the agency's discretion to reject, and choose not to believe, the testimony of witnesses called in support of a claim for benefits, even where that testimony is uncontradicted, respondent can cite no case, and petitioner believes that none can be found, which holds that the agency is entitled to reject, out of hand, completely uncontradicted affidavits filed in support of a claim. Not a single statute or regulation, nor a single decided case, can be cited in support of the respondent's position that it proceeds on the basis of a solid legal claim or defense, or that there exists a factual basis in the record and a basis in the law, for respondent's decision to reject an award of benefits when there

exists no rational or justifiable reason for rejecting uncontradicted affidavits which fully support an award for those benefits.

The case of Wolverton vs. Schweiker, 533 F. Supp. 420 (d. Idaho 1982), a Social Security disability benefits case, clearly illustrates the principles urged above. In that case the Court observed:

> "... a finding that the Secretary's decision was not supported by substantial evidence does not require a concurrent finding that the Secretary's position was not substantially justified...(however), this Court found, in reversing the Secretary, not only that there was a a lack of substantial evidence to support the Secretary's position, but, rather, that there was no evidence to support his position."

Respondent has noted, in a previous brief, that Wolverton awarded attorney's fees because there was no evidence in support of the Secretary's position. The District

Court, in its initial determination, found that with respect to an award of post-1980 benefits the record contained no evidence in support of the Secretary's position. That finding was never modified, amended, or changed in any way in subsequent proceedings. It is determinative of this issue.

The conclusion is, therefore, inescapable that, under the provisions of the Equal Access to Justice Act in effect at all times pertinent to this case, your petitioner was entitled to have attorney's fees awarded with respect to those services rendered to petitioner in a non-administrative setting which related to petitioner's post-1980 claim.

2. Your petitioner submits that his 1971 claim for benefits was re-opened and that benefits from 1971 to date should have

been awarded him. In order for petitioner to have his 1971 claim re-opened and reconsidered on the merits, the Secretary must have (1) in fact, reconsidered the claim on the merits, and (2) the case must have been re-opened in accordance with Department regulations. It is petitioner's position that both occurred in the instant case.

Petitioner asserts that the reconsideration was undertaken in accordance with pertinent regulations. The regulations pertinent to the re-opening of this claim are to be found in 20 CFR Sections 404.988 (c)1 and (8). Your petitioner contends that a proper re-opening of the 1971 claim occurred due to the fact that there was "error on the face of the evidence" in the 1971 and 1975 proceedings.

Moreover, the re-opening of the 1971 claim did, in fact, occur. The agency and

the administrative law judge did not apply res judicata nor refuse to re-open the 1971 claim. The administrative law judge did not dismiss claimant's hearing request in 1981 or refuse to consider any of the issues and eventually rendered a decision on the merits of the claim. No purported refusal to reconsider the 1971 claim appears in the record until after the District Court's consideration of the case and its remand for findings on paternity in 1983.

In its review action on November 11, 1983, the Appeals Council adopted the administrative law judge's finding of paternity and basic entitlement to insurance benefits, but modified the recommended decision by asserting, for the first time, when the case was almost three years old, that no re-opening had occurred, that

the administrative res judicata applied to the 1971 claim and that benefits would be paid only on the 1980 claim.

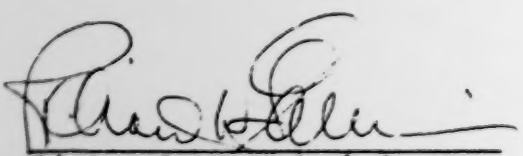
Indeed, when your petitioner recommenced judicial review of the case at bar, and alleged in his amended complaint that the 1971 claim had been re-opened, defendant never denied these allegations in a responsive pleading. In McGowan vs. Harris, 666 F. 2nd 60, (4th Cir. 1981), the Court held that when a discretionary re-opening for a claim for benefits is possible under the regulations, the agency may conduct a "threshhold review" to determine whether full re-opening on the merits is justified, but that when the agency goes beyond threshhold review, and considers the merits of the case, then the agency has waived administrative res judicata where the regulations permit discretionary review

in the first instance. This is exactly what transpired in the instant case.

## CONCLUSION

For the reasons stated above, your petitioner contends that the 1971 application for benefits was re-opened for consideration by the Agency, due to the existence of "error on the face of the record," and that administrative res judicata, if it applied at all, was waived by the Agency.

Respectfully submitted,



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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

No. _____

JOHN ROBINSON by His Guardian Ad Litem
MARY JANE YOUNG, Petitioner

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH
AND HUMAN SERVICES, Respondent

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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATE COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 85-1639

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John H. Robinson,

Appellant,

versus

Margaret M. Heckler, Secretary
of the Department of Health
and Human Services,

Appellee.

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Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro, Hiram H. Ward, Chief District Judge. (C/A 81-817).

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Argued: December 2, 1985

Decided: February 21, 1986

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Before WINTER, Chief Judge, MURNAGHAN, Circuit Judge, and SWYGERT, Senior Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

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James B. Weeks (Gabriel, Berry, Weston & Weeks; Gary B. Goodman on brief) for Appellant; Sharon F. Adams, Regional Attorney, Department of Health and Human Services (Kenneth W. McAllister, United States Attorney on brief) for Appellee.

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MURNAGHAN, Circuit Judge:

FACTS

On September 8, 1966, John H. Robinson was born to Mary Jane Robinson. She and her husband had separated in 1964, and she established a liaison with John Howard Jones, Jr. Mr. Jones could not wed Mrs. Robinson because her marriage had not been dissolved prior to his involvement in a serious motorcycle accident which occurred on January 13, 1966, eight months before the birth of John H. Robinson. Thereafter, Jones lived until 1972, but in seriously debilitated condition which served to inhibit his marriage to Mary Jane Robinson.

On June 8, 1971 Mary Jane Robinson applied on behalf of John H.

Robinson[1] for social security benefits as the child of the wage earner, John Howard Jones, Jr. The application was denied on August 31, 1971. Notification obviously came shortly thereafter, for Mary Jane Robinson declined to seek reconsideration, although urged by counsel for the grandmother of John H. Robinson to do so. The denial of the application, therefore, became final.

On April 30, 1980, over eight years after the death of John Howard Jones, Jr., Mary Jane Robinson filed another application for John H. Robinson, seeking to resurrect the 1971 claim, although as originally filed her application did not refer to the 1971

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1 He, being under five years of age, clearly was in no position to act for himself.

filing. The Social Security Agency denied relief on the grounds of failure to establish the claim, but on application to the United States District Court for the Middle District of North Carolina for judicial review the matter was remanded on the grounds that the decision was not supported by evidence.

On remand, paternity was established, as was the fact that John Howard Jones, Jr. had been living with Mary Jane Robinson to an extent sufficient to establish a claim to benefits in favor of John H. Robinson.[2] However, the Appeals Council, contending that the 1971 application had become administratively final, declined to award benefits

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[2] The ALJ found waiver of administrative res judicata and determined that an award dating back to 1971 was appropriate.

for the period from and after the effective date of the 1980 application.

Mary Jane Robinson appealed once more, this time from the denial of benefits for the period from 1971 to 1980. The district court affirmed the Agency's decision and further denied an application on behalf of John H. Robinson for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A).

In the course of the initial appeal, the magistrate to whom the case had been assigned reached, sua sponte, the conclusion that investigation by the Agency of the 1980 application had not simply stopped at the grounds of administrative res judicata, but rather had proceeded to determine on the merits that eligibility was not made out of any

event, either as to support contributions by John Howard Jones, Jr., or as to living by him with Mary Jane Robinson. On that basis the magistrate, although the point had not been raised by either of the parties, suggested that McGowen v. Harris, 666 F.2d 60 (4th Cir. 1981), required a determination that administrative res judicata had been eliminated as a defense, since there had been consideration of the merits of the claim. Acceding to that judicial pronouncement, the Agency determined that, effective in 1980, John H. Robinson did meet the requirements of a grant of benefits insofar as paternity and "contribution" or "living with" requirements were concerned and awarded him the requested relief for the period from 1980 forward. John H. Robinson's coun-

sel concedes that formal proof of paternity had not been presented in the 1971 proceeding.

## THE MERITS

There is a major and controlling difficulty with the way in which the case was proceeded. Assuming that the facts of McGowen otherwise parallel those of the present case, there is, nevertheless one large difference. McGowen's second application occurred within two years of the denial of the first application. The second application on behalf of John H. Robinson came after a lapse of nearly nine years. The pertinent regulation sets a maximum for reopening at four

years.[3] Accordingly, McGowen should not have here been

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3 20 C.F.R. § 404.988(b) permits reopening of a determination by the Agency for good cause within four years of the date of the notice of the initial determination. 20 C.F.R. § 404.988(c) permits reopening at any time, for two of the specified reasons, neither of which, however, is applicable to the facts of the instant case, i.e., a) the initial determination was obtained by fraud or similar fault, or b) there was an error appearing on the face of the evidence. There is no contention that the Agency committed fraud. The assertions that Mary Jane Robinson's behavior, in her representative capacity, in not pursuing the 1971 claim is similar to fraud or that fraud on her part is what the regulation sought to cover border on the frivolous. Cf Holloway v. Schweiker, 724 F.2d 1102, 1105 (4th Cir. 1984), cert. denied. ____ U.S. ____ 104 S.Ct. 2664 (1984).

Error on the face of the evidence does not encompass a disputed issue of fact since, almost as a matter of definition, when facts are in dispute no single answer is evident. Furthermore, parternity not having been established in 1971, (Continued)

applied.[4]

Following inexorable logic, had the point been preserved for appeal, which it was not only because of the

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error could scarely have been established on the face of the evidence pertaining to the initial applicaiton.

Obviously, McGowen, the lapse being less than four years, was not barred from seeking reopening under 20 C.F.R. § 404.988(b). Just as clearly, John H. Robinson was precluded from doing so. See McGowen, 666 F.2d at 65. "Even less, within time limits and for 'good cause' shown reopen the claim. . . ." (Emphasis supplied.)

[4] We do not make anything of the fact that, in the end, the decision in McGowen fully favored the Secretary. The district court was held properly to have dismissed for lack of jurisdiction on administrative res judicata grounds, the action to review the Secretary's denial of the claim. McGowen, supra, 666 F.2d at 66. The detailed attention paid by the court to the matter of possible waiver of administrative res judicata as a defense makes us
(Continued)

exercise by the Agency of its discretion in favor of John H. Robinson, we might well be compelled to require the striking out of the award of benefits from 1980 forward, as well as affirm the denial of benefits from 1971 to 1980. See McGowen, supra, 666 F.2d at 67.[5] However, we are not called upon to address the question insofar as the

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loath, however, to label its observations "mere dicta." While it can be contended that the ultimate result on the merits rendered superfluous the resolution of the issue of waiver, it is more persuasive an argument that the question of whether there was jurisdiction to review the dismissal of the claim had first to be decided, irrespective of what the decision on the merits might ultimtely turn out to be.

5 It might be contended that in addressing the claimant's "new" evidence of biological parentage through acknowledgement and of substantial support by the wage (Continued)

merits are concerned,[6] inasmuch as the Agency humanely consented to and has not appealed from the award of benefits from 1980 on.[7]

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earner, and in addressing the claimant's "new" legal theories based upon the intestacy laws of Maryland and Michigan, the ALJ and the Appeals Council in legal effect, though not formally, repoened the claim, thereby exposing the Secretary's final decision to judicial review. We do not think that, properly assessed, this is the correct interpretation of the administrative actions.

6 It does, however, play a role when we come to consider Robinon's Equal Access to Justice Act claim.

7 Nor need we investigate the question of whether, when the Agency, despite a complete administrative res judicata bar, nevertheless, considers a claim on the merits to some extent, a) by doing so it of necessity waives entirely the res judicata defense or b) it may elect to proceed in a tentative way, spelling out that it is doing just that, to determine
(Continued)

There were also due process denial contentions made on behalf of John H. Robinson, primarily growing out

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whether, as a matter of administrative grace, it should allow benefits from and after the date of the second application. McGowen, supra, 666 F.2d at 67-68, addresses the second question, but it must be appreciated that, in the end, what was uttered was, in one principal respect, not essential to the disposition of the case. If the answer reached had only been "assumed," not "decided," the ultimate outcome of the case would not have differed. We also proceed, therefore, on merely an assumption, not taking, as finally decided, in a binding precedential fashion, the question. Not addressing the question we, nevertheless, are struck by the likelihood that, if the former conclusion were reached, the result might well be the throttling prior to birth of any humane tendencies on the part of the Department of Health and Human Services and lead HHS vigorously to apply to the fullest possible extent administrative res judicata in every case, however, equitable the grounds might be to permit an award limited to benefits in futuro.

of supposed but unsubstantiated, mental incompetence in 1971 and thereafter of Mary Jane Robinson. We pause to mention, but do not discuss at length, the attempt somehow to bolster that contention with the observation that John H. Robinson, being less than five years old in 1971, was without competence as a consequence of his extreme youth. However, it is that very consideration which has led to his mother's acting for him. It is her competence vel non which is controling, not that of John H. Robinson. One may not have things both ways, relying on incompetence when it is in one's interests to do so, while simultaneously availing one's self of a guardian to act for one.

It is our preference to address every facially arguable contention made,

but ones so farfetched they tend to denigrate the Fifth Amendment to the United States Constitution properly should not be dignified by detialed response. To do so would suggest substance where none, n fact, exists and would tend to trivialize a document which should be reserved for situations where an argument of reasonable weight can be advanced. Were the suppositious lack of mental ability of Mary Jane Robinson to appreciate the necessity for taking steps to preserve the right to an evidentiary hearing in 1971 following denial of the claim sufficient to prove mental illness under Schrader v. Harris, 671 F.2d 267 (4th Cir. 1980), the defense of administrative res judicata would become largely a dead letter. On analogous reasoning, nearly every com-

mitter of a serious crime of violence would be classifiable, presumptively at least, as insane.

It should not be overlooked that there has been no request on behalf of John H. Robinson for a hearing to determine the mental competency or lack thereof of Mary Jane Robinson. Had there been, the burden of proof would have rested on John H. Robinson. Schrader, supra, 671 F.2d at 303. Instead, we are simply asked to take on faith conclusion not pressed in hearings before the Agency or in the district court. From a reading of the initial complaint filed on December 15, 1981, one receives not the slightest inkling that the 1971 proceedings had taken place. Amendment of the complaint of December 8, 1983, however, set forth

reasons why the doctrine of administrative res judicata, relying on the 1971 proceedings, should not be deemed applicable. The amendment no where intimates a lack of mental competence on the part of Mary Jane Robinson. Her representation of John H. Robinson as his guardina ad litem has continued undisturbed until the present.

That such is the case is hardly surprising inasmuch as counsel for the claimant, on February 11, 1981, called Mary Jane Robinson (her remarried name being Mary J. Young) to testify as to very material historical facts relating to proof of paternity and support. The step is not consistent with the belated assertion of mental incompetence on her part. Nevertheless, we do not address and do not intend to foreclose the

possibility that further proceedings in the way of a new claim may be instituted alleging other independent evidence of mental incompetence of Mary Jane Robinson. Leviner v. Richardson, 443. F.2d 1338, 1343 (4th Cir. 1971). We express no opinion as to the viability of such an attempt.

The attack all along has been directed to the issue of waiver of an administrative res judicata defense which would have been available if pressed, not to a contention that the 1971 denial of benefits rested ab initio on an insubstantial basis because of the mental incompetence of the applicant's representative.

ATTORNEY'S FEES

Since the award for 1980 on was the result of administrative largesse,

not properly compellable by legal process, and one for which an appeal by John H. Robinson was not required, the administrative decision having been in his favor, the situation is not an appropriate one for allowance of attorney's fees under the Equal Access to Justice Act.[8] While the matter is by no means entirely free from doubt, we assume for present purposes that, as the district judge held, John H. Robinson has "prevailed." Nevertheless, we are satisfied that the special circumstances

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8 It is relevant to observe that, through the initial appeal, irrespective of the outcome the Government took a legally supportable position that all benefits, pre- or post-1980, should be denied. The genesis of the claim pertaining to th eperiod from 1980 on was the discretionary action of the Agency and once it was taken the claim required no legal action on the part of counsel for John H. Robinson.

of the case in any event make an award of attorney's fees unjust. While the point was not asserted in the district court, it is one the judge mentioned in his opinion. He was fully aware of it, so the primary reason for refusing to consider it (see United States v. One 1971 Mercedes Benz, 542 F.2d 912, 915 (4th Cir. 1976)) is not present in all its usual force. Most importantly, we are at one with the conclusion of the district judge that the positon of the Government was substantially justified. Accordingly, the application for such fees is denied, and the judgment of the district court affirmed in all respects.

AFFIRMED.

SWYGERT, Senior Circuit Judge.

Concurring in part and dissenting in part. Although I concur in the result reached, except as to attorney's fees, I write separately to indicate my views of the case.

I concur with the majority that the denial of the 1971 claim was not reopened. I believe, however, that the majority's statement that "[a]ccordingly, McGowen should not have been applied," supra at 5, may create confusion about the true holding of McGowen. In McGowen the claimant seeking a surviving child's insurance benefits filed an original applicaiton which was denied and then filed his second applicaiton within two years of the denial of the first. The claimant

was not time-barred because the Secretary may reopen a final determination based upon good cause (under 20 C.F.R. § 404.989), such as for "new and material evidence" furnished. Id. at 65. That "good cause" reopening is limited by the regulations to a time period of within four years of the date of the notice of the initial determination. 20 C.F.R. § 404.988(b).

There was no need in McGowen to confront the more difficult question presented by the instant case: Can there be a discretionary reopening where the second application was filed almost nine years after the first? There is nothing in the McGowen decision that limits discretionary reopenings to four years under "good cause." Just as the Secretary can reopen a final deter-

mination at any time--without violating federal law or regulations--if any of the conditions set out in sections 404.988(c)(1)-(10) are satisfied. The holding in McGowen, as I view it, is not that there is a four-year limitation on all reopenings, but that when a discretionary reopening is possible under the regulations, the Secretary may conduct a "threshold review" (to determine whether a full reopening on the merits is justified), without thereby exposing the Secretary's final decision to judicial review. Id. at 67.

The majority opinion does recognize in a footnote, supra at 5 n.3, that a reopening is possible beyond the four-year limitation when the conditions of fraud or similar fault, or error on the face of the evidence are met. 20 C.F.R.

§§ 404.988(c)(1) and (8). But the majority refutes claimant's arguments that reopening of the 1971 claim occurred on one of these grounds. A review of the facts convinces me that the issue of whether there was "error on the face of the evidence" is much closer than the majority's footnote indicates.

Robinson argues that the Secretary, in 1971 and 1975, erred in stating that she did not allege evidence of "living together" or contributing to support." However, I must ultimately agree with the majority that there was no statutory ground to reopen the 1971 denial on the basis of an error as to whether "living with" had not been alleged. This is because Robinson, through her own negligence, simply failed to produce evidence in 1971 on the second-required prong of

eligibility for her son: paternity.

Therefore, because none of the criteria for reopening "at any time" provided in section 404.988(c) are applicable in this case, the new and material evidence submitted with the application dated April 30, 1980, and which was considered on its merits, was relevant only to the extent it provided a basis for benefits from 1980. That evidence has no relevance to any reopening of the August 31, 1971 determination because such evidence was submitted is well beyond the period provided in section 404.988(b) of the regulations and, accordingly, the determination was administratively final. For that reason, I concur with the majority that the claimant failed to demonstrate a statutory ground on which to reopen the 1971

determination after almost nine years has elasped.

With respect to the Secretary's award of benefits beginning in 1980, I must take exception to certain of the language in the majority opinion:

> Following inexorable logic, had the point been preserved for appeal, which it was not only because of the exercise by the Agency of its discretion in favor of John H. Robinson, we might well be compelled to reuqire the striking out of the award benefits from 1980 forward, as well as affirm the denial of benefits from 1971 to 1980. See McGowen, supra, 666 F.2d at 67. However, we are not called upon to address the question insofar as the merits are concerned, inasmuch as the Agency humanely consented to and has not appealed from the award of benefits from 1980 on.

Supra at 6 (footnotes omitted). I do not believe inexorable logic under

McGowen would lead to striking the award of benefits from 1980 forward were the issue before us.

The Secretary has waived any assertion of res judicata as to the benefits from 1980 on. The Secretary did not promptly appeal at the time the first district court opinion was issued (when that court found that there had been a reopening of the 1971 claim). Instead, the Appeals Council sent the case to the Administrative Law Judge for a hearing on paternity. When the Administrative Law Judge recommended that benefits be granted as of 1971, the Appeals Council explicitly stated that it did not adopt that part of the decision. But the Appeals Council did not reject the recommended benefits from 1980 on instead, it referred to the "new and

material evidence" submitted with the 1980 application, which was "considered on its merits," and held that the evidence was relevant to the extent that it provided a basis for finding that the claimant was the "child" of the deceased wage earner. To date, the Secretary has not appealed the grant of benefits beginning in 1980. Therefore, the Secretary has waived any defense of res judicata as to the 1980 application.

It seems without question that the Secretary's eventual award of benefits beginning in 1980 was not based on "largesse"; instead, it reflected the solid evidence establishing both paternity and living with/contributing to. Upon the 1980 application, Robinson put forward extensive new and material evidence consistent with the earlier affidavits.

The award of benefits from 1980 on was upheld at every administrative and judicial level following the first remand. Had the Secretary refused to grant benefits beginning in 1980, given the new and material evidence presented with the second application, the decision I believe would have been reversed on appeal. For that reason, although I concur in the majority's result of affirming the award of benefits in 1980, I cannot concur with any language indicating that such a grant was due basically to a humane impulse on the part of the Secretary and that it did not rest on a firm statutory ground.*

For the same reason, I must dissent from the majority's denial of attorney's fees. At issue are attorney's fees for the judicial review commenced on

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* See attached Appendix.

December 15, 1981, and culminating in the district court's order of September 27, 1984. Plaintiff asks for fees exclusively for services in a non-administrative setting, stating that he will forego requesting fees for administrative proceedings because those fees were paid from the award made on Robinson's 1980 claim.

Because the attorney's fees sought are only for the 1980 claim, the majority is compelled by the needs of consistency to deny the fees because of its view of the merits of the 1980 claim. The majority states:

> Since the award for 1980 on was the result of administrative largesse, not properly compellable by legal process, and one for which an appeal by John H. Robinson was not required, the administrative decision having been in his

> favor, the situation is not an appropriate one for allowance of attorney's fees under the Equal Access to Justice Act.

Supra at 10. As I argue above in regard to the 1980 claim, it is my reading of the facts that the granting of benefits beginning in 1980 was the result not of "largesse," but the new and material evidence which was submitted with the 1980 claim.

Under the Equal Access to Justice Act, a prevailing party may obtain attorney's fees only when the Government cannot show that its position was substantially justified or that special circumstances would make an award unjust. 28 U.S.C. § 2412(d)(1)(A). Although the term "substantially justified" is not defined in the Act itself, legislative

history and caselaw have given it its meaning. The Fourth Circuit has held that "the government's position in the district court normally would be substantially justified if, as is usual, the United States attorney does no more than rely on an arguable defensible administrative record." Guthrie v. Schweiker, 718 F.2d 104, 108 (4th Cir. 1983). To be "substantially justified" the Government's position cannot be just "non-frivolous." Instead, the Government must be proceeding on the basis of a solid legal claim or defense. McDonald v. Schweiker, 726 F.2d 311, 316 (7th Cir. 1983).

The Secretary agrees that there was a factual basis in the record and a basis in the law for her decision rejecting the award of benefits beginning i 1980, forcing Robinson to

appeal to the district court for the first time. The majority opinion agrees that the Government took a legally-supportable position that the post-1980 benefits should be denied. However, the district court in its review of that initial denial of the post-1980 benefits found that the Secretary had no rational or justifiable reason for rejecting the uncontradicted affidavits of Robinson's witnesses and found that there was "no evidence" to support the Secretary's decision. Appendix at 27-28.

Although it is true, as the district court noted on its second review, that the case has presented complex and difficult factual and legal issues because of its novel setting, Appendix at 106-07, the complexity

applies only to the 1971 reopening issue. The issue of whether to grant post-1980 benefits was essentially a straightforward application of new and material evidence, and the initial Government position was supported by "no evidence." This petition for legal fees and expenses is based upon Robinson's prevailing over the Secretary only on the 1980 claim. With respect to that petition, I believe that attorney's fees should be awarded.

Finally, although I dissent from the majority's denial of attorney's fees for the post-1980 benefits litigation, I consider the request of $16,128.12 in fees too large in a case wherein the claimant was only awarded $14,727.90 (through April 1984). I would remand the case to the district

court for a hearing on an appropriate award of attorney's fees.

## APPENDIX

Department of
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION OF APPEALS COUNCIL

| | |
|---|---|
| In the case of<br>Mary J. Young o/b/o<br>John Howard Robinson | Claim for<br>Child's Insurance<br>Benefits |
| (Claimant)<br>John H. Jones<br>(Deceased) | (Social Security<br>Number 241-50-1126) |

The United States District Court for the Middle District of North Carolina remanded this case (Civil Action Number C-81-817-G) to the Secretary of Health and Human Services for further administrative action. Thereafter, the Appeals Council remanded the case to an administrative law judge.

On July 14, 1983, the administrative law judge issued a recommended decision and advised the claimant and counsel that any exception, objection, or comment concerning the recommended decision should be filed with the Appeals Council within twenty (20) days. None has been received.

In his recommended decision the administrative law judge, at least implicitly, determined that the court, by its order adopting the magistrate's

Harris, 666 F.2d (4th Cir. 1981) which was cited by the magistrate in a footnote to his findings and recommendation. The magistrate stated that "By reason of the Secretary's review of the plaintiff's application on April 30, 1980 on the merits, the Secretary has effectively reopened his earlier adverse determination in regard to plaintiff's first application" and he cited McGowen as authority. The Appeals Council believes that the present case is distinguishable from McGowen.

In McGowen an application filed in July 1965, was initially denied in February 1976, and no further action was taken by the claimant. The second application, which was held to effectively reopen the February 1976, initial determination despite the provisions of administrative res judicata, was filed in March 1978, well within the 4-year period provided for reopening by Regulations No. 4, section 404.988(b) (20 CFR 404.988(b)). However, in the present case the applicatien filed on June 8, 1971, was initially denied on August 31, 1971. The second application was filed almost 9 years later on April 30, 1980, considerably beyond the 4-year period for reopening provided by seciton 404.988(b) of the regulations. Further, none of the criteria for reopening "at any time" provided in section 404.988(c) are applicable in this case. Accordingly, the Appeals

Council is of the opinion that the new and material evidence submitted with the application dated April 30, 1980 and which was considered on its merits was relevant only to the extent that it provided a basis for finding that the claimant was the "child" of the deceased wage earner and, therefore, entitled to Child's Insurance Benefits. However, the Appeals Council is of the further opinion that the same new and material evidence has no relevance to the reopening of the August 31, 1971, determination because such reopening is well beyond the period provided in section 404.988(b) of the regulations and, accordingly, said determination was administratively final.

For the foregoing reasons, the Appeals Council adopts the findings and conclusions in the recommended decision as modified herein. It is the decision of the Appeals Council that, based on the application filed on April 30, 1980, the claimant is entitled to Child's Insurance Benefits on the account of the deceased wage earner, John H. Jones, under the provisions of section 202(d) of the Social Security Act, as amended.

APPEALS COUNCIL

(signed)
Richard F. Brodsky, Member

(signed)
Joseph E. Doneghy, Member

Date: NOV 11 1983

## APPENDIX B

IN THE UNITED STATES
DISTRICT COURT

FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

GREENSBORO DIVISION

| | | |
|---|---|---|
| JOHN H. ROBINSON, By his Guardian ad Litem, MARY JANE YOUNG | : | |
| Plaintiff | : | C-81-817-G |
| v. | : | |
| MARGARET M. HECKLER, Secretary of Health and Human Services, | : | |
| Defendant | : | |

## MEMORANDUM ORDER

This matter comes before the Court on two motions of the plaintiff. The first is plaintiff's Motion for a New

Judgment[1] (February 25, 1985) pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. The second is plaintiff's Amended Motion and Application for Fees and Costs (February 25, 1985) pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The Court will deny both motions.

The Court has become very familiar with the facts of this case.[2] The facts of this case were set out in this Court's Memorandum Opinion and Order of September 27, 1984. After this opinion,

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[1] This motion is similar to plaintiff's first motion for a new judgment which was filed on October 9, 1984.

[2] On numerous occasions since September of 1984, the Court has ruled on motions filed by plaintiff.

on February 15, 1984, the Court entered a judgment dismissing this action as there remained no issues to be decided, in essence the case was moot.

At the outset, the Court will deny plaintiff's request for a new judgment. In essence the plaintiff asks the Court to reverse its previous decision of September 27. The Court finds no new facts or other circumstances to warrant such a reversal. The Court would remind the plaintiff that the time period in which to file notice of appeal begins to run at the filing of this Order.

In his motion for attorney's fees, plaintiff alleges that he is a prevailing party and satisfies the statutory standards for an award of attorney's fees and other expenses

against the United States. Plaintiff alludes to a number of alleged errors in the government's arguments before this Court, and states that these alleged errors show governmental conduct that is indefensible and capricious. Plaintiff asks for fees exclusively for services in a nonadministrative setting, stating he will forego requesting fees for administrative proceeding as these fees were paid from the award on plaintiffs 1980 claim.[3] Amended Affidavit of Gary B. Goodman at 2 (February 25, 1985).

The EAJA became effective on October 1, 1981 and applies to cases

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[3] The Fourth Circuit has held that a "district court can consider only those services in connection with the judicial proceedings." Guthrie v. Schweiker, 718 F.2d 104 (4th Cir. 1982)

pending on or commenced on or after that date. Under the EAJA a prevailing party[4] may obtain attorney's fees only when the government cannot show that its position was substantially justified.[5] 28 U.S.C. § 2412(d)(1)(A). The test of whether the United States' position in action is substantially justified is essentially one of reasonable-

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[4] Plaintiff obtained a remand of this case by the Court after a denial of benefits at the administrative level. Subsequently, plaintiff received an award of benefits upon remand, and, therefore, is a prevailing party for purposes of the EAJA. McGill v. Secretary of Health & Human Services, 712 F.2d 28 (2d Cir. 1983), cert. denied, 104 S.Ct. 1420 (1984).

[5] Neither party suggests that special circumstances are present that would make an award of fees unjust.

ness. The government can avoid fees if it can show its position in the lawsuit had a reasonable basis in both law and fact. Amidon v. Lehman, 730 F.2d 949, 952 (4th Cir. 1984) (citation omitted). In Guthrie v. Schweiker, the Fourth Circuit of Appeals stated:

> In the district court the government's position generally is established at the administrative level and judicial review is limited to consideration of the administrative record by cross motions for summary judgment. Therefore, the government's position in the district court normally would be substantially justified if, as is usual, the United States attorney does no more than rely on an arguably defensible administrative record. In such a situation, the EAJA would not require an award of attorney's fees. Moreover, entry of summary judgment for the claimant raises no presumption that the government's position was not substantially justified.

PUBLISHER'S NOTE:

The Following Pages Were Unavailable for Filming:

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case has presented complex issues involving admnistrative reopening of a nine year old claim. The case has also presented difficult factual and legal issues concerning whether the illegitimate plaintiff was entitled to benefits given the evidence presented by him pertaining to the paternity, "contributing to" and "living wth" requirements. One only has to review the administrative and judicial decisions in this case to appreciate the variety of legal interpretations and results that can be applied to this case. Genuine issues existed concerning this case's reopening and the extent of the reopening.[8] The

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[8] The Court agreed with the government's position that the 1971 claim was not reopened.

Court finds the government's positions to have been substantially justified under the relevant law and facts applicable to a rather novel setting presented by this case.

IT IS, THEREFORE, ORDERED that plaintiff's motins be, and the same hereby are, DENIED.

United States District Judge

April 16, 1985

APPENDIX C

IN THE UNITED STATES
DISTRICT COURT

FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

GREENSBORO DIVISION

| | | |
|---|---|---|
| JOHN H. ROBINSON, By his Guardian ad Litem, MARY JANE YOUNG, | : | |
| Plaintiff, | : | C-81-817-G |
| v. | : | |
| MARGARET M. HECKLER, Secretary of Health and Human Services, | : | |
| Defendant | : | |

J U D G M E N T

This matter came before the Court on plaintiff's Motion for Summary Judgment (December 9, 1983). In a Memorandum Opinion and Order filed September 27, 1984, the Court denied

plaintiff's motion and remanded the case to the Secretary for benefits based on the 1980 claim.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the plaintiff have and recover benefits on the 1980 claim as computed by the Secretary, and that he have and recover nothing on his other claims and that those claims be, and the same hereby are, DISMISSED.

_____

United States District Judge

February 15, 1985

APPENDIX D

IN THE UNITED STATES
DISTRICT COURT

FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

GREENSBORO DIVISION

| | | |
|---|---|---|
| JOHN H. ROBINSON, By his Guardian ad Litem, MARY JANE YOUNG, | : | |
| Plaintiff, | : | C-81-817-G |
| v. | : | |
| MARGARET M. HECKLER, Secretary of Health and Human Services, | : | |
| Defendant | : | |

MEMORANDUM ORDER

This matter is before the Court on plaintiff's Second Motion for Final Judgment pursuant to 42 U.S.C. § 405(g) and Rule 58 of the Federal Rules of

Civil Procedure. The Court will grant this motion as at this point there remains no further issues to be decided.

Plaintiff, for the first time, has brought forth documentation of the Secretary's award consistent with this Court's Memorandum Opinion and Order of September 27, 1984. The Court does not feel it "unusual" to remand a case for computation of benefits and await that award before entering a final judgment. At the time of the September 27 opinion, the resolution of all issues and payment of benefits were considerations that outweighed the entry of a party judgment simply to expedite an appeal.

IT IS, THEREFORE, ORDERED that

plaintiff's Motion for Final Judgment be, and the same hereby is, GRANTED.

A Judgment will be entered accordingly.

United States District Judge

February 15, 1985

## APPENDIX E

IN THE UNITED STATES
DISTRICT COURT

FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

GREENSBORO DIVISION

| | | |
|---|---|---|
| JOHN H. ROBINSON, By his Guardian ad Litem, MARY JANE YOUNG | : | |
| Plaintiff | : | C-81-817-G |
| v. | : | |
| MARGARET M. HECKLER, Secretary of Health and Human Services, | : | |
| Defendant | : | |

### MEMORANDUM OPINION AND ORDER

WARD, Chief Judge

This matter comes before the Court on plaintiff's Motion for Summary Judgment (December 9, 1983) pursuant to Rule 56 of the Federal Rules of Civil

Procedure. The Magistrate issued Findings and Recommendations (August 15, 1984) to which both parties filed objections. The Court will deny plaintiff's motion and remand the case to the Secretary for action consistent with this opinion.

## I. BACKGROUND

On June 8, 1971, Mary Jane Young (plaintiff), then Mary Jane McClintock, filed an application for child's benefits for John H. Robinson (minor plaintiff.)[1] The application was denied in August 1971 upon a finding that the minor plaintiff did not qualify as the "child of the wage earner." No

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[1] Mary Jane Young claimed that John H. Jones, a living and disabled wage earner, was the father of the minor plaintif.

administrative or judicial appeal was taken from this decision. In April 23, 1975, the Social Security Administration made a "special determination," in connection with the 1971 application, that the Jimenez decision[2] did not alter the determination in this case. (Tr. 75.)

Minor plaintiff, by and through his guardian ad litem Mary Jane Young (plaintiff), filed another application for benefits as the "child" of the deceased wage earner on April 30, 1980.[3]

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[2] In Jimenez v. Weinberger, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 365 (1974), the Supreme Court held that a Social Security Act's classsifcation of illegitimates into two subclassifications for eligibility purposes was unconstitutional.

[3] John Howard Jones, Jr., the deceased wage earner, had died in February of 1972.

Plaintiff has been represented by counsel through this application. On June 27, 1980, the Social Security Administration sent plaintiff notice that the claim was a duplicate and the earlier decision denying her claim applied. After reconsideration, the claim was again denied.

Plaintiff requested and was granted a hearing before an administrative law judge (ALJ). The ALJ denied the claim finding that the application was a duplicate claim. The ALJ also saw fit to make certain factual findings:[4]

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[4] It seems the ALJ felt the necessity to make these findings to show that no new evidence was produced that would alter the 1970 decision. The ALJ did not follow his findings with a specific conclusion that the claim should be denied on res judicata grounds. By (Continued)

1. That claimant was never acknowledged by wage earner in writing to be his child;
2. That claimant was never decreed by a court to be the child of wage earner;
3. That wage earner was never ordered by court to contribute to claimant's support because claimant was his child;
4. That wage earner has not otherwise been shown by satisfactory evidence to have been the father of claimant and to have been living with or contributing to the support of claimant at the time of his death; and
5. That claimant is not deemed to be child of wage earner and that claimant is not eligible to receive benefits as a surviving child of wage earner.

(Tr. 14.)

Plaintiff sought review by the Appeals Council of the administrative decision. In denying review the Appeal

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4 (Continued)
not following the clear dictates of McGowen v. Harris, 666 F.2d 60, 68 (4th Cir. 1981), the issue of reopening was clouded.

Council found that the plaintiff had not established an entitlement ot benefits. The Appeals Council stated the plaintiff's evidence lacked credibility.

Plaintiff filed this action on December 15, 1981, seeking review of the Secretary's decision. Plaintiff's claim for benefits turns upon her son's ability to qualify as the deceased wage earner's "child" under the test set forth in 42 U.S.C. § 416(h)(3)(C)(ii), which reads in part:

> (C) [I]n the case of a deceased individual--
> (ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

(emphasis added).

In considering cross-motions for judgment based on the 1980 claim, the Court found that no substantial evidence supported the Secretary's finding that plaintiff failed to meet the "living with" or a "contributing to" requirement. The Court found that the Secretary never resolved the issue of paternity and therefore remanded the action for further findings on the issue of paternity. In a footnote the Court stated that the Secretary's treatment of plaintiff's 1980 claim, had "reopened" the 1971 adverse determination according to the criteria established in McGowen v. Harris, 666 F.2dd 60 (4th Cir. 1981).[5]

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[5] At that point the issue of reopening had not been fully presented to the Court. The Court made a threshold determination that the McGowen criteria were met.

On remand, the Appeals Council vacated its denial decision and remanded the case to the AJL for further proceedings. The ALJ found that paternity, the second prong of the "deemed parentage" test was established and that plaintiff was eligible to receive child's benefits as the surviving child of the deceased wage earner. (Tr. 159.) The ALJ also took notice of the Court's statement that the Secretary's consideration of plaintiff's 1980 claim on the merits reopened the 1971 claim. The ALJ therefore recommended that plaintiff be found entitled to child's benefits based upon the application of June 8, 1971.

The Appeals Council adopted the ALJ's recommended findings in part but also rejected them in part. The Appeals

Council adopted that portion of the findings which related to paternity and the conclusion that plaintiff is the "child" of the deceased wage earner. However, the Appeals Council did not adopt the recommendation that benefits be awarded under the 1971 application.[6]

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6 The Apeals Council wrote:
The administrative law judge also concluded, as did the court, that the administrative review of the claimant's applicaiton filed on April 30, 1980, had the effect of reopening the determination made on the earlier application filed on June 8, 1971. Thus, the administrative law judge recommended that the claimant be found entitled to child's insurance benefits based on the prior application filed on June 8, 1971. The Appeals Council specifically does not adopt this part of the recommended decision.
In deciding that the determination dated August 31, 1971 (denying the claimant's June 8,

After the Appeals Council's decision was filed with this Court, plaintiff amended his pleadings and moved for summary judgment that plaintiff be entitled to benefits on the 1971 application. The Secretary filed a cross-motion to dismiss.

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6 (Continued)
1971, application) should be reopened, the administrative law judge relied on the pronouncement of the Fourth Circuit in McGowen v. Harris, 666 F.2d 60 (4th Cir. 1981) which was cited by the magistrate in a footnote to his findings and recommendation. The magistrate stated that 'By reason of the Secretary's review of the plaintiff's application of April 30, 1980 on the merits, the Secretary has effectively reopened his earlier adverse determination in regard to plaintiff's first application' and he cited McGowen as authority. The Appeals Council believes that the present case is

## II. DISCUSSION

The central issue presented to the Court is whether the Secretary in reviewing this case has "reopened" it, thereby precluding any application of administrative res judicata. Initially the Secretary alleges that this case is not reviewable by a federal court. The

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6 (Continued)
distinguishable from McGowen. In McGowen an application filed in July 1965, was initially denied in February 1976, and no further action was taken by the claimant. The second application, which was held to effectively reopen the February 1976, initial determination despite the provisions of administrative res judicata, was filed in March 1978, well within the 4-year period provided for reopening by Regulations No. 4, section 404.988(b) (20 CFR 404.988(b)). However, in the present case the application filed on June 8, 1971, was initially denied on August 31,

Secretary contends that the review of the 1971 claim was merely for the purpose of determining whether the 1980 claim was a duplicate. The Secretary

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6 (Continued)
1971. The second application was filed almost 9 years later on April 30, 1980, considerably beyond the 4-year period for reopening provided by section 404.988(b) of the regulations. Further, none of the criteria for reopening 'at any time' provided in section 404.988(c) are applicable in this case. Accordingly, the Appeals Council is of the opinion that the new and material evidence submitted with the aplication dated April 30, 1980, and which was considered on its merits, was relevant only to the extent that it provided a basis for finding that the claimant was the 'child." However, the Appeals Council is of the further opinion that the same new and material evidence has no relevance to the reopening of the August 31, 1971, determination because such reopening is well beyond the period provided in section 404.988(b) of

also asserts that reopening of this claim was barred by the expiration of the applicable time period allotted in the regulations for reopening a case. To the contrary, the plaintiff contends that a reopening on the merits has occurred. Beyond this the plaintiff alleges that there were no time restrictions on "reopening" this case. Plaintiff also alleges that a denial of procedural due process has occurred.

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6 (Continued)
the regulations and, accordingly, said determination was administratively final.
For the foregoing reasons, the Appeals Council adopts the findings and conclusions in the recommended decision as modified herein. It is the decision of the Appeals Council that, based on the application filed on April 30, 1980, the claimant is entitled to Child's Insurance Benefits on the

## A. JURISDICTION

The Court wil first address the Secretary's contention that the Court lacks jurisdiction to review this case. The United States Supreme Court in Califano v. Sanders, 43 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977), did establish the general rule that the Secretary's decision not to reopen a claim for benefits is not reviewable in federal courts. However, in the present case the Court is determining whether the claim has, in fact, been reopened by the Secretary. This determination is within the Court's jurisdiction.

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6 (Continued)
account of the deceased wage earner, John H. Jones, under the provisions of section 202(d) of the Social Security Act, as amended. (Tr. 154-155).

McGowen v. Harris, 666 F.2d 60, 66 (1981). A court has "jurisdiction to determine its own jurisdiction." McGowen 666 F.2d at 64. The Court would abdicate its responsibility "by responding in a purely Pavlovian way" to the Secrtary's assertion that res judicata applied. Tolbert v. Secretary of Health, 537 F.Supp. 631, 633 (1982).

B. REOPENING OF CLAIM

The record establishes that in 1971 and 1980, for res judicata purposes, plaintiff has advanced one claim. The first application was a claim of entitlement under the Social Security Act for insurance benefits as the surviving dependant child of an insured wage earner. See 42 U.S.C. §§ 402(d)(1), 416(e). The second claim was a duplicate claim and presented the same

issues as the first. In legal contemplation this is a single claim. See Restatement (Second) of Judgments § 61 (1980). The "unitary nature of the claim is not affected by the fact that following denial on the merits [of the 1980 application], the claimant [in 1980] presented 'new and material' evidence tending to establish that he was the wage earner's dependent." McGowen v. Harris, 666 F.2d 60, 67 (4th Cir. 1981).

"However even where res judicata is applicable to a claim the Secretary may, within time limits . . ., reopen the previous decision and reconsider it on the merits." Peacock v. Heckler, 578 F.Supp. 192, 194 (1984) (citing 20 C.F.R. §§ 404.987 - 404.989). Under the Social Security Regulations and McGowen,

in order for a claimant to avoid the application of administrative res judicata the Secretary must: (1) reconsider the claim on the merits,[7] McGowen, 666 F.2d at 65; and (2) the reconsideration must be within the time allotted for opening this type of claim. 20 C.F.R. §§ 404.987-989; accord Fowler v. Califano, 596 F.2d 600 (3d Cir. 1979). Upon reconsideration of this case the Court finds that the claimant has failed to meet the second prong necessary to the determination that Secretary has reopened the case. The Secretary could not have reopened this case as the

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[7] For purpose of this case the Court will assume that this prong has been met. Although the 1980 claim, on several occasions, was found to be a duplicate the record lends itself to the view that the Secretary did to some extent reconsider the merits of the claim beyond a threshold inquiry.

Social Security Act and the Regulation promulgated thereto prevent reopening after a certain time period.[8]

A determination may be reopened for good cause within four years of the date of notice of the initial determination. 20 C.F.R. § 404.988(b). However, under certain circumstances a prior determination may be reopened at any time. 20 C.F.R. § 404.988(c). These time

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[7] (Continued)
The Secretary may also meet this requirement by explicitly granting a claimant's request for reopening. In this case there are no allegations that the Secretary did so.

[8] It is important to note that the Fourth Circuit in McGowen was not faced with the timing question as the claimant brought his second application approxiately two years following denial of the first. This was clearly within the four year time frame to reopen a case for "good cause." 20 C.F.R. § 404.988.

limits serve as a regulatory statute of limitation whose purpose is to promote finality and certainty.[9] The plaintiff contends that the claim, on behalf of her son, fits into three of the circumstances that allow an unlimited time to reopen.

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[9] 20 C.F.R. § 404.988 reads in pertinent parts:

A determination, revised determination, decision, or revised decision may be reopened--

(a) Within 12 months of the date of the notice of the initial determination, for any reason;

(b) Within four years of the date of the notice of the initial determination if we find good cause, as defined in § 404.989, to reopen the case; or

(c) At any time if--

(1) It was obtained by fraud or similar fault;

. . .

(3) A person previously determined to be dead, and on whose earnings record your entitlement is based, is later found to be alive;

. . .

(1)

Plaintiff first contends that the initial determination "was obtained by fraud or similar fault." 20 C.F.R. § 404.988(c)(1). Plaintiff, guardian ad litem of plaintiff minor, takes the anomalous position that she was guilty of inexcusable negligence to the detriment of the minor plaintiff. Plaintiff states that in 1971 she: (1) knowingly concealed the identities of several material witnesses whose testimony was later presented in 1981; (2) knowingly refused to cooperate in undergoing a blood test which would have positively

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[9] (Continued)
(8) It is wholly or partially unfavorable to a party, but only to correct clerical error or an error that appears on the face of the evidence that was considered when the determination or decision was made; or

. . .

established claimant's paternity; (3) that she knowingly disregarded all requests for additional information and cooperation from SSA representatives. Plaintiff's Revised Substitute Brief on Motion for Summary Judgment, at 11-12.

The Fourth Circuit has stated "viewed, properly, 'similar fault' means a fault analogous to fraud on the part of the agency." Holloway v. Schweiker, 724 F.2d 1102 (1984). The plaintiff has made no allegation of action by the agency analogous to fraud, but instead brazenly states that Holloway's interpretation of what constitutes similar fault "defies any reasonable reading or interpretation of the regulatory provision and the underlying agency guidance on that provision."

Plaintiff's Supplemental Brief on Motion for Summary Judgment (May 16, 1984) at 4. The Court agrees with the Fourth Circuit interpretation and finds no merit in plaintiff's argument that the claim fits under 20 C.F.F. § 404.988(c)(1).

(2)

Plaintiff next argues that the 1971 and 1975 determination were wholly or partially unfavorable[10] to her minor son and therefore the claim can be reopened at any time to correct clerical error or an error that appears on the face of the evidence that was considered when the determination was made. 20 C.F.R. 404.988(c)(8).

---

[10] In both determinations the plaintiff was totally denied benefits.

> An error on the face of the evidence exists where, on the basis of all the evidence in the file on which the determination or decision was based and any evidence of record anywhere in the Administration at the time such determination or decision was made, it is clear that the determination or decision was incorrect.

Lauritzen v. Weinberger, 514 F.2d 561, 563 (8th Cir. 1975) (quoting the Social Security Claims Manual). The burden of showing error on the face of the evidence, resides with the plaintiff. Gosnell v. Secretary of Health and Human Services, 703 F.2d 216, 219 (6th Cir. 1983). A shift in the weight of the evidence or a different inference drawn from the evidence is not an error on the face of the evidence. Lauritzen v. Weinberger, 514 F.2d 561, 563 (8th Cir. 1975) (quoting the Social Security

Claims Manual). For error on the face of the evidence to exist there must have been a manifest injustice to a claimant or manifest error in the record. Lauritzen, 514 F.2d at 563.

Plaintiff contends that in the 1971 denial of benefits and the 1975 "special determination" finding that "contribution and 1/w were not alleged"[11] was error on the face of the evidence. (Tr. 75). The Court does not agree. It is true that in 1971 plaintiff had filed a written statement with the Social Security Administration which included the statement that, "[w]e had lived together as if we had been married for at least six months prior to his

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[11] The abbreviation 1/2 stands for living with

njury." (Tr. 71.) However, in this ame statement the plaintiff states that ecedent wager earner rented a room at a oarding house during this six month eriod. (Tr. 71.) She also stated that he decedent maintained this separate oom "because he was concerned with eing prosecuted for maintaining a resi- ence with me prior to marriage." (Tr. 1.) As to the contribution element, he plaintiff's statement includes a eference to her work during this eriod; no statement was made of the age earner's contribution to her. iven the plaintiff's entire written tatement, to hold the finding that contribution and l/w were not alleged" o be clearly incorrect would engage the ourt in a straw grasping exercise from

he high. The Court finds no error on he face of the evidence.

The plaintiff argues that by analogy heir claim satisfies 20 C.F.R. § 04.988(c)(3) and therefore justifies eopening at any time. The Court finds his argument unpersuasive. There is no ispute as to the death of the wage arner in this case. This subsection as promulgated to address a specific ituation and is not to be read as llowing reopening any time merely ecause the claimant has presented new vidence.

The Court finds no applicable excep- ion to the four-year limitation for eopening a case.

C. DUE PROCESS

Lastly, the plaintiff argues that if the summary judgment motion is not granted the minor plaintiff's due process rights will be violated. In Holloway the court stated:

> The essence of Holloway's [due process] complaint, then, is no more than that the proper exercise of a valid statute of limitation has rendered time-barred his otherwise meritorious claim and that therefore a constitutional violation occurred. The contention that such a claim rises to the level of a constitutional deprivation is wholly insubstantial and frivolous.

Holloway v. Schweiker, 724 F.2d 1102, 1105 (4th Cir. 1984). The Court finds that the claimant's only complaint to be the proper exercise of a valid statute of limitation. The Court will not convert this claim of abuse of agency discretion into a constitutional claim.

The plaintiff's constitutional challenge is without merit.

## III. CONCLUSION

Until the 1980 application the Social Security Administration was not presented all necessary facts, because the plaintiff knowingly concealed evidence and knowingly refused to cooperate with the Social Security Administration. Plaintiff's Revised Substitute Brief on Motion for Summary Judgment at 11. To find the Social Security Administration responsible for what the plaintiffs[12] now call "inexcusable negligence" is to not only shift the burden of showing grounds for reopening

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[12] Both plaintiff (guardian ad litem) and minor plaintiff make this characterization.

but also require the Social Security Administration's decision to remain open until a claimant is successful. This is clearly foregoing to the essence of the administrative process; the essence being that a claim reach a state of finality and not progress ad infinitum.

The Court finds that the application was not reopened in 1980. In accordance with this opinion the plaintiff, based on the April 30, 1980 application, is entitled to benefits computed from that date.

IT IS, THEREFORE, ORDERED that plaintiff's motion for summary judgment be, and the same hereby is DENIED and the case is remanded to the Secretary for an award based on the 1980 claim.

IT IS FURTHER ORDERED that plaintiff's Motion to Strike (March 23, 1984) be, and the same hereby is, DENIED.

_____
United States District Judge

September 27, 1984

## APPENDIX F

IN THE UNITED STATES
DISTRICT COURT

FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

GREENSBORO DIVISION

| | | |
|---|---|---|
| JOHN H. ROBINSON, By his Guardian ad Litem, MARY JANE YOUNG | : | |
| Plaintiff | : | C-81-817-G |
| v. | : | |
| MARGARET M. HECKLER, Secretary of Health and Human Services, | : | |
| Defendant | : | |

## MAGISTRATE'S FINDINGS AND RECOMMENDATIONS

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g), requesting judicial review of the decision of the Secretary of Health and Human Services with respect to

plaintiff's claim for child's insurance benefits on the account of a deceased wage earner. The factual background and procedural history to plaintiff's claim are important to resolution of this action and are therefore set out at length.

## I. FACTUAL BACKGROUND

On September 8, 1966, Mary Jane Robinson (now Mary Jane Young, guardian ad litem in this action) gave birth to John Howard Robinson, the minor plaintiff herein. At the time of plaintiff's birth, Mary Jane Robinson was married to, but separated from, Dewey C. Robinson, Jr. The Robinsons were later divorced in July of 1968.

Mary Jane Robinson began living with John Howard Jones, Jr. in or about

October 1964 and continued to live with him until January 13, 1966 when Jones was seriously injured in a motorcycle accident. As a result of the injuries suffered by Jones, he was found by the Social Security Administration to be disabled from the date of January 13, 1966. Jones remained continuously disabled until his death in February 1972. Plaintiff brings his claim herein on the account of the deceased wage earner Jones.

Plaintiff was born 265 days after Jones' motorcycle accident. Jones did not acknowledge paternity in writing but did so verbally to several people. The minor plaintiff was named John Howard Robinson in honor of John Howard Jones, Jr. Other evidence presented by the

plaintiff to the Secretary suggested that plaintiff is the son of the deceased wage earner and that the wage earner lived with and supported plaintiff's mother (the child being en ventre sa mere) at the time he became disabled.

## II. PROCEDURAL HISTORY

On June 8, 1971, Mary Jane Young (then Mary Jane McClintock) filed an application for child's benefits on behalf of the minor plaintiff and on the account of then still living John H. Jones, Jr. The application was denied in August 1971 upon a finding that plaintiff did not qualify as the "child" of the wage earner. No administrative appeal from the denial decision was taken. In connection with the

1971 aplication, a "special determination" was made by the Social Security Administration on April 23, 1975 that additional development of the case was not necessary. The special determination read:

> The changes due to the Jimenez decision (and the related changes contemplated in the related court cases which are pending) do not alter the determination in this case. There was no written acknowledgement because the wage earner was incompetent at the time of the child's birth. Contribution + 1/w were not alleged.

(Tr. 75.)

Plaintiff, by and through his guardian ad litem, filed another application for benefits as the "child" of the deceased wage earner on April 30, 1980.

For the first time, plaintiff was represented by counsel. The claim was denied on initial consideration and reconsideration, and plaintiff requested a hearing before an administrative law judge (ALJ). After the hearing, the (ALJ) denied the claim, finding:

1. That claimant was never acknowledged by wage earner in writing to be his child;

2. That claimant was never decrred by a court to be the child of wage earner;

3. That wage earner was never ordered by court to contribute to claimant's support because claimant was his child;

4. That wage earner has not otherwise been shown by satisfactory evidence to have been the father of claimant and to have been living with or contributing to the support of claimant at the time of his death; and

5. That claimant is not deemed to be child of wage earner and that claimant is not eligible

> to receive benefits as a surviving child of wage earner.

(Tr. 14)

Plaintiff requested further review of the administrative decision by the Appeals Council. In denying the request for review, the Appeals Council wrote, in part:

> In connection with the request for review, your representative submitted written argument stating his reasons for believing that you have established John's entitlement to child's insurance benefits. Also, submitted were affidavits signed by you and Myrtle Jones indicating the reasons why you did not actively pursue the 1971 application for benefits and that Mrs. Jones and her husband made the initial effort to obtain social security benefits for John.
>
> In view of the period of disability established for John H. Jones, Jr. as of January 13, 1966, the Appeals Council agrees that significant contributions he made to you in December 1965 and January 1966, while you were pregnant with John, or his living with you in those months, would have been sufficient

for Mr. Jones to have been considered as living with John or contributiong to his support at the time he became disabled. With respect to the "living with" requirement, the record showed that the wage earner maintained a residence separate from yours at the time of his death. Although you submitted affidavits indicating that the wage earner slept overnight with you every night from late 1964 until January 1966, the Appeals Council does not believe these third party statements giving minute details regarding another individual's activities of more than 15 years ago are credible. Moreover, your own statements of when he lived with you varied from 6 months on your 1971 application to nearly 2 years in connection with the 1980 application. In view of these conflictiong statements as compared to documentary evidence showing that the wage earner was paying for a room at another address, the Appeals Council does not believe the record establishes that he was living with you at any time.

With regard to contribution, the record shows that when you initially filed an application for benefits, you did not alleged that he was contributing to your support. In fact, you stated that you were not able to prepare breakfast for him because you were working the second

> shift. In view of your own work activities, and the wage earner's maintenance of a household separate from yours, the Appeals Council does not believe that the current statements regarding support you submitted were credible. Therefore, in the absence of satisfactory evidene establishing that you were living with the wage earner or receiving contributions to your support from him, John does not have status as his child under section 216(h)(3)(C)(ii) of the Social Security Act.

(Tr. 4-5).

Plaintiff filed this action on December 15, 1981, seeking review of the Secretary's decision. Plaintiff's claim for benefits, as conceded by both parties, turns upon plaintiff's ability to qualify as the deceased wage earner's "child" under the test set forth in 42 U.S.C. § 416(h)(3)(C)(ii), which reads in part:

> (C) [I]n the case of a deceased individual--
>
> (ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

In considering cross-motions for judgment, the Court found that no substantial evidence supported the Secretary's finding that plaintiff failed to meet the "living with" or "contributing to" requirements. The Court further found that the Secretary had not reached the question of paternity and therefore remanded the action for further findings on the issue of paternity. The Court further stated, in a

footnote citing McGowen v. Harris, 666 F.2d 60 (4th Cir. 1981), that the Secretary's treatment of plaintiff's 1980 claim on the merits, rather than as precluded by administrative res judicata, effectively "reopened" the adverse determination on plaintiff's first application in 1971. (See Magistrate's Findings and Recommendations of January 26, 1983, p. 1; Order of Remand of February 23, 1983).

On remand, the Appeals Council vacated its denial decision and remanded the case to the ALJ for further proceedings. The ALJ found that paternity, the second prong of the "Deemed parentage" test was established and that plaintiff was eligible to receive child's benefits as the surviving child

of the deceased wage earner. (Tr. 159.) The ALJ also took notice of the Court's statement that the Secretary's consideration of plaintiff's 1980 claim on the merits reopened the 1971 claim. The ALJ therefore recommended that plaintiff be found entitled to child's benefits based upon the application of June 8, 1971.

The Appeals Council adopted the ALJ's recommended findings in part by also rejected them in part. The Appeals Council adopted that portion of the findings which related to paternity and the conclusion that plaintiff is the "child" of the deceased wage earner. However, the Appeals Council did not adopt the recommendation that benefits be awarded under the 1971 application. The Appeals Council wrote:

The administrative law judge also concluded, as did the court, that the administrative review of the claimant's application filed on April 30, 1980, had the effect of reopening the determination made on the earlier application filed on June 8, 1971. Thus, the administrative law judge recommended that the claimant be found entitled to Child's Insurance Benefits based on the prior applicaiton filed on June 8, 1971. The Appeals Council specifically does not adopt this part of the recommended decision.

In deciding that the determination dated August 31, 1971 (denying the claimant's June 8, 1971, aplication) should be reopened, the administrative law judge relied on the pronouncement of the Fourth Circuit in McGowan v. Harris, 666 F.2d 60 (4th Cir. 1981) which was cited by the magistrate in a footnote to his findings and recommendation. The magistrate stated that 'By reason of the Secretary's review of the plaintiff's application of April 30, 1980 on the merits, the Secretary has effectively reopened his earlier aderse determination in regard to plaintiff's first application' and he cited McGowen as authority. The Appeals Council believes that the present case is distinguishable from McGowen.

In McGowen an applicaiton filed in July 1965, was initially denied in February 1976, and no further action was taken by the claimant. The second application, which was held to effectively reopen the February 1976, initial determination despite the provisions of administrative res judicata, was filed in March 1978, well within the 4-year period provided for reopening by Regulations No. 4, section 404.988(b) (20 CFR 404.988(b)). However, in the present case the application filed on June 8, 1971, was initially denied on August 31, 1971. The second application was filed almost 9 years later on April 30, 1980, considerably beyond the 4-year period for reopening provided by section 404.988(b) of the regulations. Further, none of the criteria for reopening 'at any time' provided in section 404.988(c) are applicable in this case. Accordingly, the Appeals Council is of the opinion that the new and material evidence submitted with the application dated April 30, 1980, and which was considered on its merits, was relevant only to the extent that it provided a basis for finding that the claimant was the 'child.' However, the Appeals Council is of the further opinion that the same new and material evidence has no relevance to the reopening of the August 31, 1971,

> determination because such reopening is well beyond the period provided in section 404.988(b) of the regulations and, accordingly, said determination was administratively final.
>
> For the foregoing reasons, the Appeals Council adopts the findings and conclusions in the recommended decision as modified herein. It is the decision of the Appeals Council that, based on the application filed on April 30, 1980, the claimant is entitled to Child's Insurance Benefits on the account of the deceased wage earner, John H. Jones, under the provisions of section 202(d) of the Social Security Act, as amended.

(Tr. 154-155.)

After the Appeals Council's decision was filed with this Court, plaintiff amended his pleadings and moved for summary judgment that plaintiff is entitled to benefits on the 1971 application. The Secretary filed a cross-motion to dismiss.

## III. CONTENTIONS OF THE PARTIES

Plaintiff's contention is that the award of benefits in this case must be made under the 1971 application, not the 1980 application. Plaintiff, relying upon McGowen v. Harris, asserts that the Secretary "reopened" the 1971 application by considering upon the merits the 1980 duplicate application. Plaintiff also asserts alternative constitutional claims based upon "manifest injustice and due process."

The Secretary, citing the decision of the Appeals Council dated November 11, 1983, contents that there has been no reopening by the Secretary of plaintiff's 1971 claim and that the 1971 claim is barred by application of administrative res judicata. The

Secretary argues that she could not have reopened plaintiff's 1971 claim since the 1980 application was not filed within four years of the 1971 claim (see, 20 C.F.R. § 404.988[b]) and no factual grounds existed for reopening the claim after the passage or more than four years' time. (See, 20 C.F.R. § 404.988[c].) The Secretary concludes that since the 1971 application has not been reopened by the Secretary, and the time for direct judicial review of the 1971 denial decision has long since expired, the Court has no jurisdiction over the controversy.

## IV. DISCUSSION

In McGowen v. Harris, the Court of Appeals observed that the application of administrative res judicata to Social

Security disability claims often presents a "vexed" issue. McGowen v. Harris, supra, at 64. Certainly, such a "vexed" issue presents itself here. After four years of administrative proceedings and litigation, plaintiff's claim, now partially granted by the Secretary, turns on the correct application of the principles of res judicata and "reopening" of administrative decisions, as those concepts have been developed in McGowen v. Harris and related cases.

As a starting point, the Court notes that the 1971 denial decision of the Social Security Administration, which plaintiff did not pursue to the highest available administrative panel, was a final decision of the Secretary. It was

entitled to be deemed by the Secretary to be preclusive of subsequent identical claims on behalf of plaintiff. Shrader v. Harris, 631 F.2d 297, 300-01 4th Cir. 1980). Of course, res judicata preclusion of a subsequent claim by the Secretary is proper only if the same claim is presented in a subsequent application. (20 C.F.R. § 404.957(c)(1).) Ordinary principles of res judicata concerning the scope of a claim for purposes of merger and bar apply. McGowen v. Harris, supra at 65. And, most importantly in this case, even if the same claim is brought a second time, the Secretary may "reopen" the claim as a matter of discretion and consider it upon the merits. (20 C.F.R. § 404.987-989).

In the case at bar, it is unquestioned that the 1980 application and the 1971 application on behalf of plaintiff present the same claim. The ALJ specifically recognized that the second claim was a duplicate claim and presented the same issues. (Tr. 11.) Consequently, the task before the Court is that described by the Court of Appeals in McGowen v. Harris as follows:

> From this it is evident that upon a challenge to its jurisdiction on the basis that administrative res judicata has been applied in bar of a claim, or that discretionary reopening of a previously denied claim has been denied, or both, the district court has jurisdiction to determine, as appropriate, whether res judicata has properly been applied, or whether, though res judicata might properly have been applied, the claim has nevertheless been reopened. See Farley v. Califano, 599 F.2d [606], 608 & n.4 [(4th Cir. 1979)]. In this the court simply exercises its inherent jurisdiction to determine its own

> jurisdiction. Texas & Pacific Railway v. Gulf, Colorado & Santa Fe Railway, 270 U.S. 266, 274, 46 S.CT. 263, 265, 70 L.Ed. 578 (1926). If the court determines that jurisdiction exists either because administrative res judicata was not properly applied, or because the denied claim has been either formally or by legal implication reopened, it may then of course judically review the Secretary's final decision denying the claim.

McGowen v. Harris, supra, at 66.

The teaching of McGowen v. Harris is that even if a second application for benefits could be denied by the Secretary by reason of administrative res judicata, "if it has nevertheless been reconsidered on the merits to any extent and at any administrative level, it is thereupon properly treated as having been, to that extent, reopened . . ." McGowen v. Harris, supra, at 65. In its order of remand, the Court pre-

viously noted that the ALJ, by determining plaintiff's 1980 application on the merits, without application of res judicata, reopened plaintiff's identical 1971 claim by legal implication. Review of the administrative record in this case demonstrates that such a reopening clearly occurred. The ALJ, in his findings of July 20, 1981 (appearing above), found facts concerning the "living with" and "contributiong to" tests which resulted in the failure of plaintiff's claim for child's benefits. The Appeals Council affirmed, with further discussion of the reason why plaintiff's proof failed to establish his claim as the "child" of the wage earner. Nothing in the decisions of the ALJ or the Appeals Council suggests that

plaintiff's 1980 claim was denied because of the res judicata effect of the identical 1971 claim.

It is true, of course, that the Secretary is free to consider and weigh new evidence on a second, identical claim. Mere consideration of new evidence does not constitute a reopening of a prior claim. This is so because the Secretary must be free to make a threshold determination whether the new evidence should result in a reopening under 20 C.F.R. § 404.988, or whether res judicata preclusion should be applied. McGowen v. Harris, supra at 67; First National Bank of Louisville v. Master Auto Service Corp., 693 F.2d 308 (4th Cir. 1982); Waste Recovery Corp. v. Mahler, 566 F. Supp. 1466 (S.D.N.Y.

1983); and Peacock v. Heckler, 578 F. Supp. 192 (N.D. Ga. 1984). However, the Secretary, in the ALJ's decision of July 20, 1981 and the Appeals Council's decision of October 30, 1981, did not end consideration of the 1971 application at this threshold, but proceeded to determine plaintiff's 1980 application on the merits. Under McGowen v. Harris, determination on the merits, by legal implication, constitutes a reopening of an identical 1971 claim. This reopening was not "undone" by the Appeals Council's later attempt, in its decision of November 11, 1983 to apply administrative res judicata. Reopening is accomplished by determination on the merits at any administrative level, and therefore such reopening was complete

long before November 11, 1983. McGowen v. Harris, supra at 65.

The Secretary attempts to distinguish McGowen v. Harris by arguing that the Secretary had no authority to reopen the 1971 claim because the second application was filed long after the four-year period in which the Secretary has discretion to reopen a determination "for good cause." (See, 20 C.F.R. § 404.988[b].) In McGowen v. Harris, the second application followed the first denial by only approximately two years, within the four-year limitation established in 20 C.F.R. § 404.988(b).

20 C.F.R. § 404.988 reads as follows:

> A determination, revised determination, decision, or revised decision may be reopened--
>
> (a) Within 12 months of the date of the notice of the initial determination, for any reason;

(b) Within four years of the date of the notice of the initial determination if we find good cause, as defined in § 404.989, to reopen the case, or

(C) At any time if--

(1) It was obtained by fraud or similar fault;

(2) Another person files a claim on the same earnings record and allowance of the claim adversely affects your claim;

(3) A person previously determined to be dead, and on whose earnings record your entitlement is based, is later found to be alive;

(4) Your claim was denied becuase you did not prove that the insured person died, and the death is later established by reason of an unexplianed absence from his or her residence for a period of 7 years;

(5) The Railroad Retirement Board has awarded duplicate benefits on the same earnings record;

(6) It either--

(i) Denies the person on whose earnings record your claim is based gratuitous wage credits for military or naval service because another

Federal agency (other than the Veterans Administration) has erroneously certified that it has awarded benefits based on the service, or

(ii) Credits the earnings record of the person on which your claim is based with gratuitous wage credits and another Federal agency (other than the Veterans Administration) certifies that it has awarded a benefit based on the period of service for which the wage credits were granted;

(7) It finds that the claimant did not have insured status, but earnings for the appropriate period of time were later credited to his or her earnings record;

(8) It is wholly or partially unfavorable to a party, but only to correct clerical error or an error that appear on the face of the evidence that was considered when the determination or decision was made; or

(9) It finds that you are entitled to monthly benefits or to a lump-sum death payment based on the earnings of a deceased person, and it is later established that (i) you were convicted of a felony or an act in the nature of a felony for intentionally causing that person's death; or (ii) if you were subject

> to the juvenile justice system, you were found by a court of competent jurisdiction to have intentionally caused that person's death by committing an act which, if committed by an adult, would have been considered a felony or an act in the nature of a felony.

The Secretary contends that she had no authority under the 1980 application to reopen plaintiff's 1971 application, even for "good cause," since the time limitation in 20 C.F.R. § 404.988(b) had elasped. The Secretary further argues that she could not have reopened the 1971 claim under 20 C.F.R. § 404.988(c) (which provides for reopening "at any time") because none of the grounds listed in that regulation exists in this case.

The Court does not agree. In the first place, it is disingenuous of the Secretary to argue that her actions in

reopening plaintiff's 1971 claim were an abuse of her own discretion. Nothing in McGowen v. Harris suggests that the Court should review for abuse of discretion the Secretary's action in reopening a prior claim. Moreover, the Court would find no abuse of discretion under the circumstances of this case in any event. One of the causes for reopening a claim "at any time" is, "[i]t is wholly or partially unfavorable to a party, but only to correct clerical error or an error that appears on the face of the evidence that was considered when the determination or decision was made; [20 C.F.R. § 404.988(c)(8).] In its 1975 "special determination," the administration denied plaintiff's claim upon a finding that "contribution + 1/w

were not alleged." (Tr. 75.) The error of this statement is apparent on the face of the evidentiary record. Plaintiff had filed a written statement with the Social Security Administration in 1971 which included a statement that, "[W]e had lived together as if we had been married for at least six months prior to his injury . . . ."(Tr. 71.) This statement constitutes an unmistakable allegation that the deceased wage earner "lived with" plaintiff's mother while plaintiff was en ventre sa mere and also implies, at least, that he supported her. (Under the "lived with" or "supported" test, a claimant must establish either, but not both, of these factors.) Thus, the Secretary's reopening of the 1971 claim in 1980

could not constitute an abuse of the Secretary's discretion to reopen the claim under 20 C.F.R. § 404.988(c)(8).

In sum, the Secretary, by legal implication in determining plaintiff's 1980 claim, reopened the 1971 identical claim. Since the Secretary found plaintiff entitled to benefits under the 1980 claim, the entitlement must be based upon the reopened 1971 claim.

RECOMMENDATIONS

It is therefore recommended that plaintiff's motion for summary judgment be granted and that this action be remanded to the Secretary for an award of benefits based upon the 1971 claim. It is further recommended that plaintiff's motion for an award of attorney's fees not be reached unless

renewed after entry of judgment and that plaintiff's motion to strike, filed March 23, be denied.

Paul Trevor Sharp, United States Magistrate

August 15, 1984

## APPENDIX G

IN THE UNITED STATES
DISTRICT COURT

FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

GREENSBORO DIVISION

| | | |
|---|---|---|
| JOHN H. ROBINSON, By his Guardian ad Litem, MARY JANE YOUNG, | : | |
| Plaintiff, | : | C-81-817-G |
| v. | : | |
| RICHARD S. SCHWEIKER, Secretary of Health and Human Services, | : | |
| Defendant | : | |

J U D G M E N T

On January 26, 1983, in accordance with 28 U.S.C.§ 636(b), the Findings and Recommendations of the United States Magistrate were filed and served on the parties in this action and a copy was given to the Court.

Within the time limitation set forth in the statute, counsel for the plaintiff objected to the Findings and Recommendations.

The Court has appropriately reviewed plaintiff's objections and finds that they do not change the substance of the Magistrate's report to which objection was made and has made a de novo determination which is in accord with the Magistrate's report.

In order to prevail, the plaintiff must establish (1) that the disabled wage earner was his father, and (2) that the wage earner was living with or contributing to plaintiff's support at the time he became disabled. The Magistrate concluded, and the Court

agrees, that the Secretary never resolved the first requirement and that there is no substantial evidence to support the Secretary's finding that the plaintiff failed to meet the second requirement. Neither did the Secretary state any rational basis for rejecting the uncontradicted evidence of the plaintiff relating to the second requirement. The Court therefore adopts the Magistrate's Findings and Recommendations.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the plaintiff's motion for judgment reversing the Secretary's decision be DENIED, that defendant's motion for judgment on the pleadings be DENIED, and that this matter be REMANDED

to the Secretary for further proceedings consistent with the Findings and Recommendations of the Magistrate.

_____
United States District Judge

February 23, 1983

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## APPENDIX H

IN THE UNITED STATES
DISTRICT COURT

FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

GREENSBORO DIVISION

| | | |
|---|---|---|
| JOHN H. ROBINSON, By his Guardian ad Litem, MARY JANE YOUNG, | : | |
| Plaintiff, | : | C-81-817-G |
| v. | : | |
| RICHARD S. SCHWEIKER, Secretary of Health and Human Services, | : | |
| Defendant | : | |

## MAGISTRATE'S FINDINGS AND RECOMMENDATIONS

Plaintiff brings this action pursuant to 42 U.S.C. §405(g), seeking judicial review of the Secretary's

decision denying his application, by and through his guardian ad litem, for surviving child's insurance benefits.[1] Defendant has answered, requesting dismissal of this action, and plaintiff has filed a motion for summary judgment. The entire administrative record has been certified to the Court.

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[1] Plaintiff's application has been heard and denied at all administrative levels. After hearing, Administrative Law Judge Rufus K. Hayworth denied plaintiff's claim on July 20, 1981. The Administrative Law Judge's decision was adopted by the Appeals Council on October 30, 1981. Plaintiff's application giving rise to these administrative decisions was filed on April 30, 1980. (Tr. 76-79.) The application largely duplicated a claim made originally on June 8, 1971. By reason of the Secretary's review of plaintiff's application of April 30, 1980 on the merits, the Secretary has effectively reopened his earlier adverse determination in regard to plaintiff's first application. See McGowen v. Harris, 666 F.2d 60 (4th Cir. 1981).

The Secretary found that plaintiff is not entitled to surviving child's benefits for the reason that plaintiff does not have the status of a child of deceased insured wage earner, John Howard Jones, Jr. (hereinafter sometimes referred to as the wage earner). Both plaintiff and defendant concede that, under the circumstances of this case, plaintiff can qualify as the wage earner's "child" only by demonstrating the paternity of the wage earner in accordance with 42 U.S.C. §416(h) (3) (C) (ii), which reads:

> (C) [I]n the case of a deceased individual--
>
> (i) such insured individual--
>
> (I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter.

and such acknowledgement, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died. [Emphasis added.]

The Secretary found that plaintiff may not be deemed to be the "child" of the wage earner, as defined by the

statute. Specifically, the Secretary found that the evidence did not show that the wage earner lived with or supported the plaintiff at the time the wage earner became disabled.[2] Plaintiff contends that the Secretary's findings are not supported by substantial evidence and are based upon an erroneous legal standard.

STATEMENT OF FACTS

The importance of the factual issues presented calls for a detailed

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[2] The wage earner became disabled on January 13, 1966, and remained disabled until his death in February 1972. Under these circumstances, the question is whether the wage earner lived with or supported plaintiff at the time the wage earner became disabled, rather than at the time he died. See 42 U.S.C. § 405(d) (1) (C); see also the decision of the Appeals Council, Tr. p. 5.

In June, 1971, in connection with the initial application for benefits on plaintiff's behalf, four witness statements were submitted to the administration. (Tr. pp. 71-74.) Mary Jane Young, plaintiff's mother, stated that plaintiff is the son of John Howard Jones, Jr., who was severely injured in a motor vehicle accident on January 13, 1966. At the time of the accident, Ms. Young was pregnant with plaintiff. Ms. Young stated that the wage earner was living with her in a house at 1374 Lees Chapel Road in Greensboro and that they had been living together as if they had been married for at least six months prior to the wage earner's injury. She stated that she

had sexual relations with no person other than the deceased wage earner during this period of time. Ms. Young stated that prior to his injury, the wage earner knew that she was pregnant and acknowledged this fact to other persons. She stated that following the birth of plaintiff, the deceased wage earner acknowledged to other persons that he was the father of plaintiff.

Ms. Young additionally stated that although the wage earner was living with her prior to his being injured in January of 1966, he paid rent on a room in a boarding house owned by Ms. Eloise Moore. She stated that he did not sleep in that room, but did eat breakfast at the boarding house since she worked

second shift. She stated that the wage earner maintained the separate room because he was concerned about being prosecuted for maintaining a residence with her prior to her divorce from Dewey C. Robinson, Jr.

In the 1971 statements, Mr. & Mrs. John Howard Jones, the parents of the deceased wage earner, stated that the wage earner told them on a number of occasions that plaintiff was his child. They stated that the wage earner acknowledged his paternity both prior to the birth of the child and after the birth of plaintiff. Ms. Eloise Moore stated that for at least six months prior to January 13, 1966, she rented a room in her boarding house to the wage

earner. She stated that during the time the wage earner rented a room from her, with the exception of a very few days, he would return to her house from work in the afternoon and leave again at about 9:00 p.m. She stated that wage earner would then return to her boarding house in the very early morning, usually about 6:00 a.m. and would have breakfast there before going to work. She stated that the wage earner brought to her boarding house on one occasion a young woman named Mary Jane and told her that he and Mary Jane were planning to be married as soon as his divorce was complete. Ms. Moore also stated that after the wage earner was injured, she visited him at a nursing home and, on

the occasion of one of these visits, the wage earner told her that during the period of time he was renting a room from her, he was spending his nights with Ms. Young and that they were going to have a baby.

In July of 1971, Ms. Bessie Hall, a volunteer worker at the Evergreens Nursing Home, submitted her statement to the administration. In her statement, Ms. Bessie Hall stated that at times during his stay at the Evergreens, the wage earner was rational and lucid. She stated that a young woman often visited the wage earner at the Evergreens. She also stated that at first this young woman was pregnant, and later, after she had the baby, she brought the baby with

her to see the wage earner. She stated that on one occasion, when the wage earner was rational, he recognized the visitor and the baby and indicated that the baby was his child. Ms. Hall also stated that the young woman told her that she and the wage earner had been living together and that they were planning to get married and still intended to be married.

In connection with plaintiff's 1980 application, a number of additional affidavits were submitted to the administration. These include the affidavits of (1) Kaye L. Kivett, who lived with Ms. Young from 1964 through 1967 (Tr. pp. 111-114); (2) Myrtle C. Jones, the wage earner's mother (Tr. pp.

115-116); (3) James K. Miller, a resident of Ms. Moore's boarding house from 1964 to present (Tr. 121); and (4) Michael W. Kivett, the present husband of Kaye Kivett (Tr. pp. 123-124). Additionally, Mary Jane Young submitted a further statement to the administration (Tr. pp. 97-98).

In her affidavit Ms. Kivett stated that she lived in the same residence with Mary Jane Young during the years 1964 through 1967. She stated that John H. Jones, Jr., the wage earner, resided with Ms. Young in the residence during part of 1964, all of 1965, and a portion of 1966 until his motorcycle accident. Ms. Kivett stated that the wage earner worked first shift and Ms. Young worked

second shift. The wage earner usually left the house early in the morning at about 7:00 a.m. and returned to the home in the late afternoon or early evening. Ms. Kivett stated that during the period of time in question she was never aware that the wage earner had a room at any rooming house. She also stated that the wage earner usually gave her money to pay the house rent, and she particularly recalled that during the months of December, 1965 and early January, 1966, the wage earner paid the full rent for the residence because Ms. Young was sick and was losing a lot of work time. Ms. Kivett also stated that during the same period of time the wage earner paid for groceries and utilities for the

residence. Ms. Kivett stated that she first learned that Ms. Young was pregnant about 3 or 4 weeks prior to the wage earner's accident in January, 1966. She stated that the wage earner had purchased a diamond engagement ring for Ms. Young, and they were planning to be married as soon as each of them were divorced. Ms. Kivett specifically recalled that about a week before the wage earner's accident in January, 1966, the wage earner bought champagne and invited Ms. Kivett and her boyfriend (now her husband) to celebrate Ms. Young's pregnancy and the expected arrival of the baby. Ms. Kivett stated that subsequent to the accident of January, 1966, she visited the wage

earner at the hospital and at various nursing homes. She stated that the wage earner always had a picture of Ms. Young by his bed and told everyone that the expected baby was his child. Ms. Kivett also stated that from her observations of the wage earner and the baby boy, it is her opinion that the child looks exactly like the wage earner.

Michael W. Kivett stated that he knew the wage earner for about a year and a half prior to his motorcycle accident in January, 1966. Mr. Kivett stated that at that time he was dating a woman who is now his wife, Kaye L. Kivett. Mr. Kivett stated that during the year and a half he knew Mr. Jones, the wage earner resided in a house on

Lees Chapel Road with Ms. Young. Mr. Kivett stated that Mr. Jones kept and maintained most of his personal property and clothing at the house on Lees Chapel Road. He also stated that during this period of time the wage earner bought groceries for Ms. Young once a week and paid utility expenses and rent on the house on Lees Chapel Road. He stated that he observed the wage earner give money to either Ms. Young or Ms. Kivett for the purpose of paying the rent and, on several occasions, he observed the wage earner pay the rent directly to the landlord. Mr. Kivett recalled specifically an occasion when the wage earner and Ms. Young and Mr. and Ms. Kivett went out to dinner to celebrate

Ms. Young's pregnancy. Mr. Kivett stated that he was never aware of Ms. Young dating any other man other than the wage earner during the year and a half prior to the wage earner's motorcycle accident.

James Kenneth Miller stated that he has resided in a boarding house operated by Eloise T. Moore from 1964 until the present. He stated that both Mr. Jones, Jr., and he worked on the day shift from 8:00 a.m. to approximately 4:00 p.m. in the years 1964 through early 1966. He stated that after work, the wage earner would bring him home to the boarding house and then go to Ms. Young's house in the evening. Mr. Miller states that the wage earner did not keep many clothes in

his boarding house room and never stayed there overnight. Mr. Miller states that the wage earner and Ms. Young started living together at the residence on Lees Chapel Road sometime during the summer of 1964. He further states that about a week before the motorcycle accident of January, 1966, the wage earner told him that he and Ms. Young were going to be married and that the wage earner indicated that Ms. Young was pregnant and was going to have his child. Mr. Miller further states that based upon his observation and knowledge of the wage earner and the child (plaintiff herein), there is no doubt in his mind that the wage earner is the father of the plaintiff.

Ms. Myrtle C. Jones, the stepmother of the wage earner, stated that the first time she ever met Ms. Young was at the hospital on the evening of the wage earner's motorcycle accident. She stated that Ms. Young came up to her and introduced herself and said that she and the wage earner were planning to get married and that she was pregnant with the wage earner's child. She stated that Ms. Young showed her a diamond engagement ring at that time. Ms. Jones stated that at least on one occasion at the Evergreens Nursing Home, the wage earner identified the plaintiff as his son. Ms. Jones further stated that the plaintiff has a physical appearance

identical to the wage earner, and stated her opinion that plaintiff is the son of the wage earner.

In her 1980 statement to the administration, Ms. Young stated that she lived together with the wage earner about once and a half to two years before he had a motorcycle accident in January of 1966. In a letter sent to the administration (Tr. pp. 99-101), Ms. Young stated that plaintiff was taken on a number of occasions to nursing homes to see his father. She stated that her son has pictures of his father in his room and, like all kids, "thinks his father was superman." She stated that before the wage earner died, her son used to talk about his father getting

well and taking him fishing.

Ms. Young testified at hearing before the Administrative Law Judge that she separated from her husband, Dewey Robinson, in August, 1964, and thereafter moved into a house on Lees Chapel Road in Greensboro. (Tr. p. 34.) She obtained a deed of separation from Mr. Robinson on October 2, 1964. Ms. Young testified that Mr. Jones, Jr., began living with her in October, 1964. She testified that he contributed to the rent and utilities on the house at Lees Chapel Road and also purchased groceries and paid for laundry in support of Ms. Young. (Tr. p. 37.) Ms. Young testified that the wage earner worked the first shift, from 7:00 a.m. to 3:00

p.m., and she worked the second shift, from 3:00 p.m. to 11:00 p.m. (Tr. p. 41.) She further Testified that the wage earner stayed at her home every night from October of 1964 until mid-January of 1966, and the two lived essentially as common-law husband and wife. (Tr. p. 36.)

Ms. Young testified that she discovered she was pregnant in December of 1965. (Tr. pp. 38-39.) On January 13, 1966, the wage earner had a motorcycle accident (Tr. p. 40), which incapacitated him and rendered him disabled until the time he died in 1972. (Tr. p. 46.)

Ms. Young also stated at hearing that she and the wage earner discussed

names for the baby while the wage earner was in the hospital and a nursing home, with the result that the baby was named John Howard, after John Howard Jones, Jr. (Tr. 43.) Plaintiff was born on September 8, 1966, several months after the wage earner's motorcycle accident. (Tr. p. 69.)

LEGAL ANALYSIS

The scope of judicial review of the Secretary's decision in a disability case has been described by our Circuit as "extremely limited." Frady v. Harris, 646 F.2d 143, 144 (4th Cir. 1981). The Court must carefully review the entire record to determine whether the Secretary has applied the correct legal standards, and whether his findings are

supported by substantial evidence. Locklear v. Mathews, 424 F. Supp. 639 (D.Md. 1976). Where this is so, the Secretary's findings are conclusive.

The Secretary's decision in this case rests entirely on credibility determinations made by the Appeals Council.[3] The Appeals Council determined that the credible evidence did not support a finding either (1) that Mr. Jones, Jr., the wage earner, was

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[3] The Appeals Council did not accept the conclusion of the Administrative Law Judge that the wage earner could not have been "living with" or "contributing to" plaintiff at the time he became disabled because plaintiff was as yet unborn at that time. Instead, the Appeals Council conceded that if the wage earner lived with or contributed to plaintiff's mother (who was pregnant with plaintiff) at the time of his disablement, the regulatory requirements would be met. Tr. p. 5.

living with plaintiff's mother during December of 1965 and January, 1966, or (2) that Mr. Jones, Jr., was contributing to the support of plaintiff's mother at that time. (Tr. p. 5.) The Appeals Council had before it no evidence contrary to the claims of plaintiff; that is, there is no evidence in the record which purports affirmatively to show that the wage earner did not live with or support plaintiff's mother at the time in question. Instead, the Appeals Council reached its conclusion because it found it should disbelieve and reject the evidence before it.

The Secretary may, in fact, reject uncontradicted evidence upon a finding

that the evidence presented to it is not credible. Beavers v. Secretary of Health, Education, and Welfare, 577 F.2d 383 (6th Cir. 1978). However, in making such a finding, the Secretary must state a rational and cogent reason for his rejection of evidence. Lund v. Weinberger, 520 F.2d 782, 785-86 (8th Cir. 1975); Gaston v. Gardner, 247 F. Supp. 441 (D.C.S.C. 1965); Stuart v. Califano, 443 F. Supp. 842 (D.C.Mo. 1978). Also, where the Secretary has not taken live testimony, but is acting only upon documentary evidence (as the Appeals Council has done here), the Secretary is in no better position to pass on the credibility of affidavits and other documents than the reviewing

court, and the court has power to review such matters. Williams v. Harris, 500 F. Supp. 214, 216 (W.D.N.C. 1980); Clifton v. Celebrezze, 228 F. Supp. 251 (N.D.Tex. 1964); Weir v. Richardson, 343 F. Supp. 353 (S.D.Iowa 1972).

The Court finds in the case at bar that the decision of the Secretary is against the uncontradicted evidence in the record and that the Secretary states no rational or cogent reason for determining that all of the evidence presented is incredible. The evidence before the Secretary has been summarized at length above; the evidence would clearly support a finding that (1) Mr. Jones, Jr., the deceased wage earner, was living with plaintiff's mother in

December 1965, and January, 1966, and (2) that Mr. Jones, Jr., was contributing the support of plaintiff's mother at that time. (Actually, plaintiff must establish only one, not both, of these allegations.)

The Secretary rejected evidence that Mr. Jones, Jr., "lived with" plaintiff's mother because he found that (1) plaintiff's mother stated in her 1971 statement that the living arrangement had lasted for six months, whereas in her 1980 application, she stated this arrangement existed for nearly two years; and (2) the affidavits concerning minute details of living together are over fifteen years old and are therefore not credible. (Tr. p. 5.)

Addressing the first reason given by the Secretary, the Court notes that, in fact, no contradiction exists between Ms. Young's 1971 statement and her 1980 statement. In 1971, Ms. Young stated that, " w e had lived together as if we had been married for at least six months prior to his injury." (Tr. p. 71.) In her 1980 statement and in her testimony before the Administrative Law Judge, Ms. Young stated that the two had lived together about one and one half to two years before the motorcycle accident of Mr. Jones, Jr., in January, 1966. These statements cannot fairly be said to be contradictory; the second statement may be more explicit, but it does not contradict the first statement. In

regard to the Secretary's second argument (that recollections are too old to be credible), it is clear that the 1980 statements and the 1981 affidavits submitted to the Secretary are entirely consistent with statements made by some of the affiants ten years earlier in 1971; therefore, no reasonable ground exists to dismiss the later statements due merely to passage of time. Moreover, the statements and affidavits relate to circumstances surrounding a tragic motorcycle accident and the birth of a baby. It is not reasonable to reject out of hand the consistent reports of several persons who were directly affected by these major events, even if their reports were written five

or fifteen years after the events in question. Nothing about the affidavits themselves suggests unreliability.

The Secretary's reasoning in rejecting evidence that Mr. Jones, Jr., contributed to the support of plaintiff's mother in late 1965 and early 1966 is unpersuasive for similar reasons. The Secretary found that Ms. Young did not state that Mr. Jones, Jr., contributed to her support when she filed her 1971 statement with the administration. But, in fact, she did not state otherwise in that statement, and she did state that, "[w]e had lived together as if we had been married . . ." (Tr. p. 71), an assertion that surely carries with it an inference of

support. The Secretary further found that Ms. Young did not prepare breakfast for Mr. Jones, Jr., and that Ms. Young was working during the time period in question. These facts do not contradict testimony that Mr. Jones, Jr., was paying rent and utilities for Ms. Young's residence and was buying her groceries. Consequently, the Secretary has stated no rational basis for rejecting the uncontradicted evidence that Mr. Jones, Jr., was contributing the support of plaintiff's mother.

Under the Social Security regulations applicable here, plaintiff must establish both that he is the son of John H. Jones, Jr., and that Mr. Jones, Jr., was living with or

contributing the support of plaintiff's mother at the time Mr. Jones, Jr., became disabled. The Court finds no substantial evidence to support the Secretary's finding that plaintiff has failed to meet the "living with" or "contributing to" requirements. The Secretary has, however, never directly addressed the first requirement. Neither the Administrative Law Judge nor the Appeals Council found that plaintiff has shown, to the satisfaction of the Secretary, that John H. Jones, Jr., is indeed the father of plaintiff.[4] It is

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[4] The Administrative Law Judge remarked that, "there has been some evidence that wage earner may have been claimant's father . . . (Tr. p. 13.) The Appeals Council did not reach the question of paternity since it found that plaintiff failed to meet the "living with" or "contributing to" requirements.

the function of the Secretary to make such findings of fact, and accordingly this proceeding should be remanded to the Secretary so that he may enter his findings on this matter. The Court notes that the Appeals Council, in its decision, appears to assume that paternity has been shown, but the matter should be directly addressed by the Secretary.

It is therefore recommended that plaintiff's motion for judgment reversing the Secretary's decision be denied, that defendant's motion for judgment on the pleadings be denied, and that this matter be remanded to the

Secretary for further proceedings

consistent with this opinion.

P. Trevor Sharp,
United States Magistrate

January 26, 1983